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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

AMES TODD O'LAVERY et al.,

Plaintiffs and Respondents,

v.

MOHAMMAD J. FAR,

Defendant and Appellant.

E067875

(Super.Ct.No. CIVDS1503058)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Pacheco, Judge. Affirmed.

Stephen H. Darrow for Defendant and Appellant.

Law Office of Monica E. Amboss and Monica E. Amboss; Liskey Law Firm and Robert J. Liskey, for Plaintiffs and Respondents.

Defendant and appellant Mohammad Far appeals from the judgment in favor of plaintiffs and respondents Ames Todd O'Lavery, Cheri O'Lavery, and Merilee Sousa following a jury trial. Ames and his daughters Cheri and Merilee brought causes of

action against Mohammad J. Far and his wife, Ruth Far (collectively, the Fars), for breach of contract, intentional misrepresentation, negligent misrepresentation, financial elder abuse pursuant to the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.), and conversion.¹ The jury found facts indicating that Mohammad was liable on all causes of action except conversion.² On appeal, Mohammad contends that (1) the special verdict forms were prejudicially defective because they did not require the jury to find whether the fraud causes of action (*i.e.*, intentional misrepresentation and negligent misrepresentation) were barred by the statute of limitations, and (2) his motion in limine to exclude portions of Ames’s deposition should have been granted. We disagree with the contentions and affirm.

I. FACTS

Ames and Mohammad met in 1985 when Mohammad was working at a car dealership. Ames would come in to purchase “trade-ins,” that is, cars that customers had traded to the dealership as a down payment. Over time, Ames and Mohammad became close friends, particularly after the death of Ames’s son in 1993. Ames and Mohammad eventually opened a used car lot together, and Ames became a father figure to Mohammad.

¹ The complaint is not part of the appellate record, but the completed special verdict forms as well as the judgment refer to only these causes of action. Also, for clarity, we refer to the parties individually by their first names. We intend no disrespect.

² Ruth was not found liable on any causes of action and is not a party to this appeal.

In 2004, Mohammad borrowed \$30,000 from Ames, and Mohammad executed the first of two promissory notes at issue in this case (the 2004 Note). Prior to this loan, Ames had made “over 50” loans to Mohammad, all of which Mohammad had repaid. Although Mohammad initially made payments on the 2004 Note, he stopped at some point, and with accrued interest, a balance of approximately \$16,500 remained outstanding on the 2004 Note prior to trial.³

In 2006, Mohammad borrowed \$40,000 from Ames and Merilee and executed a ““Promissory Note Secured by Residential Real Estate”” (the 2006 Note). The 2006 Note required Mohammad to record a deed of trust against a house in Corona, a property he used the \$40,000 to help purchase. Mohammad did not record the deed of trust, and in 2008 or so, the house underwent a short sale with the proceeds going to a third party.⁴ With accrued interest, a balance of approximately \$74,100 remained outstanding on the 2006 Note prior to trial.

In addition, at one point—around 1996 or earlier, according to Mohammad—Ames extended use of his American Express credit card to Mohammad, who at the time did not have a credit card. In 2003, Ames extended use of the card to Ruth as well.

³ Under the terms of the 2004 Note, Mohammad was to pay Ames “and/or” Cheri. Cheri testified that this was because Ames “wanted to provide for me in the case of his demise.”

⁴ “In a short sale, the lender agrees to release its lien on the borrower’s property so that the borrower can sell the property to a third party. In exchange, the borrower agrees to give the lender all of the proceeds from the sale. Both parties know that the sale proceeds will fall short of the total amount that the borrower owes.” (*Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 673.)

Mohammad made personal purchases on the card. Approximately \$10,000 remained unpaid on the card prior to trial.

At various points, Mohammad wrote checks out to Ames but asked him to hold and not cash them until told to do so. It is unclear whether Mohammed ever told Ames he could cash them. At some point, Mohammad also gave Ames a gas card as a form of repayment on one or both of the notes.

In 2015, Ames and his daughters initiated this lawsuit against the Fars. Ames was approximately 88 years old then, so the trial court granted respondents' motion for preference pursuant to Code of Civil Procedure section 36.

The trial took place the following year. Before the evidence phase, the trial court denied the Fars' Motion in Limine No. 1, which had sought to exclude "all objectionable evidence" from Ames's deposition. As a result, the full recording of his deposition was played before the jury. Ames did not personally testify at trial.

At one point, the Fars requested that the jury be instructed on the statute of limitations and offered proposed special verdict forms regarding the statute of limitations on the fraud causes of action.⁵ Ultimately the trial court partially denied the request, as

⁵ The proposed verdict forms addressed statutes of limitations for intentional misrepresentation, negligent misrepresentation, and "false promise." The record does not indicate that there was a cause of action for false promise. In any event, "an action based on a false promise is simply a type of intentional misrepresentation" (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 159, italics omitted.) We therefore construe the record as showing the Fars proposed statute of limitations verdict forms on only the fraud causes of action.

the special verdict forms used did not include a specific finding on the statute of limitations. The trial court did, however, give a jury instruction on the issue.

After deliberating, the jury found facts indicating that Mohammad was liable for breach of contract, financial elder abuse, and the fraud causes of action. The jury also found facts indicating that the Fars were not liable for conversion and that Ruth was not liable on any cause of action. After the verdict, the parties stipulated to a \$500,000 punitive damages award. In accordance with the special verdicts and the parties' stipulation as to punitive damages, the judgment awarded \$116,937.35 in compensatory damages, \$500,000 in punitive damages, and fees and costs to respondents. Specifically, the judgment was in favor of all respondents for breach of contract in the amount of \$106,491.59, in favor of all respondents for negligent misrepresentation in the amount of \$106,491.59, in favor of Ames for "fraud" (*i.e.*, intentional misrepresentation) in the amount of \$116,937.35, and in favor of Ames for financial elder abuse in the amount of \$116,937.35, with total damages set at \$116,937.35 plus punitive damages.

II. DISCUSSION

Mohammad contends that the rejection of his proposed special verdict forms on the statute of limitations was prejudicial error. He also contends that the denial of his Motion in Limine No. 1 wrongfully deprived him of the opportunity to cross-examine Ames at trial. We disagree with both arguments.

Before addressing the merits of Mohammad's contentions, we note his failure to comply with required rules. California Rules of Court, rule 8.204(a)(1)(C) provides that

appellate briefs must “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” Mohammad’s opening brief is completely devoid of any citations to the record in his statement of the case and statement of facts. Numerous other factual contentions are unsupported by citations to the record. Although “[w]e have reviewed the record in an attempt to describe the evidence submitted by the parties,” Mohammad “cannot be heard to complain that we have overlooked any disputed or undisputed material facts.” (*Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430, 435, fn. 2.) “We are not required to search the record to ascertain whether it contains support for [Mohammad’s] contentions.” (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.)

A. *Special Verdict Forms*

“[A] special verdict is that by which the jury find[s] the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.” (Code Civ. Proc., § 624.)

“When a special verdict is involved as here, a reviewing court does not imply findings in favor of the prevailing party. [Citations.] This rule stems from the nature of a special verdict and its ““recognized pitfalls,”” namely, that it requires the jury to resolve all of the controverted issues in the case, unlike a general verdict which merely implies findings on all issues in one party’s favor. [Citations.]” (*City of San Diego v. D.R.*

Horton San Diego Holding Co., Inc. (2005) 126 Cal.App.4th 668, 678.) Consequently, “[a] special verdict is ‘fatally defective’ if it does not allow the jury to resolve every controverted issue.” (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325.) Even if a special verdict form is defective, however, reversal is not required where the defect constitutes harmless error. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1244.) This is due in part to Code of Civil Procedure section 475, which provides that “[t]he court must . . . disregard any error . . . or defect . . . which, in the opinion of said court, does not affect the substantial rights of the parties.” (See *Taylor, supra*, at p. 1245.)

Here, assuming for the sake of argument that Mohammad’s proposed special verdict forms should have been submitted to the jury, the total amount of compensatory damages, as well as the availability and amount of punitive damages, would have remained the same even if the jury concluded that the fraud causes of action were time barred. The judgment stated that “excepting punitive damages . . . the amount of \$116,937.35 is the total award as to” the breach of contract, intentional misrepresentation, negligent misrepresentation, and financial elder abuse causes of action. Focusing only on the financial elder abuse cause of action, the jury found facts indicating that Mohammad was liable in the amount of \$116,937.35, the same amount as the total award. Accordingly, even if the jury concluded that the fraud causes of action were time barred, the total amount of compensatory damages would have remained the same solely on the

basis of the financial elder abuse cause of action.⁶ Punitive damages, furthermore, are available to a financial elder abuse plaintiff so long as the prerequisite findings applicable to all punitive damage awards have been made. (Welf. & Inst. Code, § 15657.5, subd. (b).) Accordingly, because any finding that the fraud causes of action were time barred would not “affect the substantial rights of the parties” (Code Civ. Proc., § 475), any purported error is harmless and insufficient to compel a reversal.

B. Motion in Limine

A few days before trial began, respondents notified the trial court that Ames would not appear for the trial due to his age and health and that respondents intended to play his video deposition instead. The Fars then brought their Motion in Limine No. 1, which sought to exclude “all objectionable evidence from the deposition of Ames Todd O’Lavery” As part of that motion in limine, the Fars listed specific pages and lines of the testimony they sought to exclude, followed by the grounds for the objections. The motion stated that the Fars “had no prior notice that [Ames] would be unable to attend trial,” and that “[u]pon learning” that respondents would instead play a recording of Ames’s deposition, they were “forced to go through the deposition in preparation for this motion.” The motion, however, did not seek to exclude Ames’s deposition testimony in its entirety. The trial court denied the motion.

⁶ Mohammad would also remain liable to all respondents (and not just Ames) for \$106,491.59 of the total amount, whether or not the negligent misrepresentation cause of action were time-barred. This is because, pursuant to the judgment, Mohammad is liable to all respondents in the amount of \$106,491.59 under both the negligent misrepresentation and breach of contract causes of action.

Mohammad does not contend in his opening brief that the jury was prejudiced by hearing any specific portion of Ames's deposition testimony.⁷ Rather, Mohammad contends that by allowing the recording of Ames's deposition to be played at trial, the trial court denied the Fars "the opportunity to cross-examine" Ames. Thus, we presume Mohammad means that it was Ames's absence from trial, not necessarily the fact that Ames's deposition testimony was played, that deprived him of a chance to cross-examine Ames. Parties in civil actions have the right to confront and cross-examine witnesses. (*People ex rel. Harris v. Sarpas* (2014) 225 Cal.App.4th 1539, 1568.) If that party was present or represented at a witness's deposition, however, and that witness is unable to testify at trial, then all or part of that witness's deposition may be used against that party at trial. (Code Civ. Proc., § 2025.620, subd. (c)(2)(C).)

Mohammad's argument fails for two reasons. First, the Fars never objected to the trial court that they did not have an opportunity to cross-examine Ames. The Fars' Motion in Limine No. 1 did not object to the introduction of Ames's deposition as a whole based on any lack of cross-examination; it objected instead to specific statements he made during his deposition. "““““No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in

⁷ For the first time in his reply brief, Mohammad contends that denial of the motion "was unduly prejudicial as the video contained irrelevant hearsay" We do not consider whether portions of the deposition testimony should have been excluded or whether playing the full recording was prejudicial, as "[a]rguments raised for the first time in the reply brief are untimely and may be disregarded." (*WorldMark, The Club v. Wyndham Resort Development Corp.* (2010) 187 Cal.App.4th 1017, 1030, fn. 7.)

criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.””””” (*City of Glendale v. Marcus Cable Associates, LLC* (2014) 231 Cal.App.4th 1359, 1379-1380, italics omitted.) We therefore consider the issue forfeited. Second, even if the issue were not forfeited, the Fars had an opportunity to—and did, through their counsel—cross-examine Ames during his deposition. The fact that the Fars were represented by different counsel at the time makes no meaningful difference, as what matters is that they had an opportunity to cross-examine Ames. That cross-examination was played for the jury along with the rest of Ames’s deposition.

Although the trial court stated that respondents needed to provide proof of Ames’s inability to attend trial, and the record does not indicate whether the proof was ever provided, the lack of such proof in the record does not mean, as Mohammad claims, that Ames “never file[d] any proof of his ailing condition.” Rather, because the record is silent on the issue, we must presume that respondents did provide proof that Ames was unable to attend trial. (See *Jameson v. Desta* (2018) 5 Cal.5th 594, 609 [““In the absence of a contrary showing in the record, all presumptions in favor of the trial court’s action will be made by the appellate court.””].) Mohammad therefore may not contend that Ames’s absence from trial was somehow unexcused. In any event, Mohammad did not claim at trial that the deposition should be excluded because Ames’s absence was unexcused.

C. Summary

Whether or not the jury should have decided whether the fraud causes of action were time barred, any corresponding defect in the special verdict forms would have been harmless. The total amount of compensatory damages, as well as the availability and amount of punitive damages, would have remained the same even without the fraud causes of action.

Mohammad's contention that his Motion in Limine No. 1 should have been granted, which is in substance an argument that he was denied an opportunity to cross-examine Ames, fails because no such objection was made to the trial court and because the Fars, through their counsel, had the opportunity to (and did) cross-examine Ames during his deposition.

III. DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

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RAPHAEL

J.

We concur:

MCKINSTER

Acting P. J.

FIELDS

J.